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PARTISAN GERRYMANDERING AND GEORGIA: RED, WHITE, AND BLUE OR JUST RED AND BLUE?

M. Christopher Freeman, Jr.*

INTRODUCTION

In 1811, the recently elected Massachusetts Governor Elbridge Gerry approved a plan to redraw electoral districts in favor of the Democratic-Republican Party over the opposing Federalist Party.¹ However, the plan and the following year's state senate election results resulted in considerable political and public opposition.² Although the popular vote was nearly split between the Democratic-Republicans and the Federalists, the former won twenty-nine of the forty available seats: nearly seventy-five percent.³ One of the new districts created by the plan, Essex, became the center of criticism for its highly unusual and serpentine shape, weaving back and forth across county lines and splitting towns in two.⁴ Political cartoonists, leaping at the opportunity to further deride Governor Gerry's redistricting plan, added talons, wings, eyes, and teeth to the Essex

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1. Greg Miller, *The Map That Polarized the Word 'Gerrymander,'* NAT'L GEOGRAPHIC (June 28, 2017), <http://news.nationalgeographic.com/2017/06/map-gerrymander-redistricting-history-newspaper/> [https://perma.cc/8FLN-UFTR].

2. See Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word of Constitutional Principle? The Case in Maryland*, 54 MD. L. REV. 242, 251 (1995) (quoting *Salem Gazette*, Mar. 27, 1812) ("Opponents attacked the plan almost from its inception. Even before its passage, newspapers described the plan as 'cutting up counties and carving out districts.'"); Miller, *supra* note 1 (criticizing the plan as "an abomination to democracy").

3. Miller, *supra* note 1. The Democratic-Republican Party won because Governor Gerry, a member of that party, needed to give Democratic-Republicans as many advantages as possible to secure his title and safeguard his party's majority control, which it was just barely maintaining. *Id.*

4. Niemeyer, *supra* note 2, at 251. Prior to this election, Massachusetts state senators were elected to represent entire counties, so there was no need for district lines to zigzag between county lines. *Id.*

district map.⁵ The resulting “pre-historic monster” resembled a salamander and, so, was entitled “The Gerry-mander.”⁶ The name stuck and became a term inseparable from the political maneuvering that created it.⁷

Partisan, or political, gerrymandering today retains its nineteenth-century roots, continuing to purposefully divide areas into districts to give an advantage to one party.⁸ The pervasiveness of gerrymandering raises issues not just in swing states like Wisconsin but also in states dominated by a single party like Georgia.⁹ Despite the long history of opposition to partisan gerrymandering in district plans, it is not always unconstitutional or improper per se.¹⁰ The Constitution vests in Congress the power of apportionment of state legislative districts, but both the Constitution and Congress remain silent with respect to mid-decade redistricting.¹¹ People and groups discriminatorily affected by heavily gerrymandered districts may still challenge the constitutionality of those apportionments under the Equal Protection Clause and the Voting Rights Act.¹²

5. *Id.* at 253; Miller, *supra* note 1. Elkanah Tisdale, an artist and Federalist, was the first to portray the “protean district” with all its monstrous features. Niemeyer, *supra* note 2, at 253.

6. Niemeyer, *supra* note 2, at 251–53 (published on March 26, 1812, in the *Boston Gazette*); Miller, *supra* note 1.

7. Niemeyer, *supra* note 2, at 253; Miller, *supra* note 1.

8. *Political Gerrymandering*, BLACK’S LAW DICTIONARY 72 (5th pocket ed. 2016); Niemeyer, *supra* note 2, at 249.

9. *Whitford v. Gill*, 218 F. Supp. 3d 837, 853, 872, 944 (W.D. Wis. 2016) (referring to citizens of Pennsylvania, North Carolina, and other swing states who also recently filed suit over state redistricting plans), *vacated*, 138 S. Ct. 1916 (2018); *see also* *Ga. State Conference of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1270 (N.D. Ga. 2017).

10. Brief of Bernard Grofman & Ronald Keith Gaddie as *Amici Curiae* in Support of Neither Party at 5, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161) [hereinafter Brief of Bernard Grofman & Ronald Keith Gaddie]; Ethan Weiss, Comment, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 697 (2013) (stating that certain amounts of politicking are acceptable so long as “legislatures adhere to traditional redistricting criteria”).

11. U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union, according to their respective Numbers”); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006); *Davis v. Bandemer*, 478 U.S. 109, 232–33 (1986).

12. *See* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”); 52 U.S.C.S. § 10301 (LEXIS through Pub. L. No. 115–60) (prohibiting apportionment schemes that reduce the voting strength of minorities); *see also* *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (establishing that “an excessive injection of politics is unlawful”).

In hearing partisan gerrymandering claims, the Supreme Court of the United States has consistently struggled with several issues, especially when it comes to applying a standard to determine when a districting scheme is unconstitutional.¹³ Though many standards have not withstood the Court's scrutiny, the Efficiency Gap (EG) is a measure that has overcome the failings of its predecessors.¹⁴ The EG is a central aspect of *Gill v. Whitford*, the Wisconsin gerrymandering case heard during the Supreme Court's October 2017 Term.¹⁵ The Court declined to exercise jurisdiction and remanded the case for want of standing without explicitly ruling on the EG's fitness as a judicially manageable measure for determining a plan's discriminatory effect.¹⁶ Therefore, the Court left the door open for future litigants to potentially succeed in integrating the EG as one piece in a larger legal test for defining unconstitutional gerrymandering.¹⁷

13. See, e.g., *Davis*, 478 U.S. at 132. A plurality of the Court held that a reapportionment plan's discriminatory effect can be shown where an electoral scheme consistently degrades the plaintiff's impact on the political process. *Id.* However, several dissenting Justices gave their own standard for showing discriminatory effect and unconstitutionality. *Id.* at 165. The dissent looked to factors like fairness, district shape, and adherence to established political subdivisions. *Id.* This divide continued in later court proceedings, particularly in *Vieth* when the Court rejected the decision in *Davis* altogether. *Vieth*, 541 U.S. at 287–88.

14. E.g., *Vieth*, 541 U.S. at 284, 287, 301; see also Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015). Justice Scalia, writing for the plurality, rejected the plaintiff's standard that required map drafters to act only with a predominant intent to achieve partisan advantage because it was too ambiguous. *Vieth*, 541 U.S. at 284. Justice Scalia also believed the Court should not have to create a standard itself. *Id.* at 305–06. He therefore dismissed Justice Kennedy's argument that a better claim could arise under the Fourteenth Amendment if it was possible to show how a permissible representation burdened the plaintiff's rights. *Id.* at 306.

15. See *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018).

16. See *id.* at 1923. It should be noted how unusual it is for the Court, after finding plaintiffs lacked standing, to remand a case so that plaintiffs have a second attempt at proving standing. See *id.* at 1933–34. Normally, the Court will “remand the case with instructions to dismiss for lack of jurisdiction.” *Id.* at 1941 (Thomas, J., concurring in part and dissenting in part).

17. See *id.* at 1941 (Kagan, J., concurring) (“Courts—and in particular this Court—will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.”); Eric McGhee, *Symposium: The Efficiency Gap Is a Measure, Not a Test*, SCOTUSBLOG (Aug. 11, 2017, 10:39 AM), <http://www.scotusblog.com/2017/08/symposium-efficiency-gap-measure-not-test/> [<https://perma.cc/9FV5-FHVU>] (explaining that the EG primarily measures voting efficiency and should be incorporated in a larger test because “a good legal test will probably end up measuring more than one thing”).

This opening is of particular importance to Georgia's most recent redistricting plan.¹⁸ Enacted in 2015, Georgia House Bill 566 shifted many district lines and incited public unrest and claims of unconstitutionality.¹⁹ In addition to the litigation already surrounding it,²⁰ the mid-decennial redistricting was quickly followed by another plan in 2017.²¹ The EG may prove a useful measure in determining whether Georgia's successive redistricting plans impose unconstitutional harm on the state's voters.

This Note will discuss the viability of the EG and its ramifications as part of a standard for evaluating the unconstitutionality of current and potential districting plans, particularly regarding Georgia's 2015 plan.²² Part I outlines the judicial history of partisan gerrymandering and also provides an overview of the EG's mechanics and the development of Georgia's reapportionment schemes.²³ Part II then examines the EG's strengths and weaknesses, applies it and other factors to Georgia's current districting map, and analyzes the map's constitutionality.²⁴ Finally, Part III proposes changes to Georgia's current plan that, through legislative conformity to specified standards, will ensure adherence to constitutional principles.²⁵

18. H.B. 566, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

19. *Id.* (revising the borders of seventeen districts); *see also* Ga. State Conference of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1270 (N.D. Ga. 2017); Bill Torpy, *Torpy at Large: Democracy Divided Should Not Stand*, ATLANTA J.-CONST. (Aug. 23, 2017, 6:00 AM), <http://www.myajc.com/news/local/torpy-large-democracy-divided-should-not-stand/KaxFVEPXsuxkBGpUe7BpeK/> [<https://perma.cc/Q7BW-H675>] (describing state politics in Georgia as "electoral insanity").

20. *See generally* NAACP, 269 F. Supp. 3d at 1270. Plaintiffs filed suit against Georgia and the Secretary of State alleging, among other things, that House Bill 566 creates unconstitutional partisan gerrymandering. *Id.*

21. H.B. 515, 154th Gen. Assemb., Reg. Sess. (Ga. 2017). Although the house passed Bill 515 just three days after it was first introduced, the senate tabled it on March 28, 2017. *Id.* The Bill would have redrawn districts whose lines had just been changed two years earlier. *Id.*

22. H.B. 566, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

23. *See infra* Part I.

24. *See infra* Part II.

25. *See infra* Part III.

I. Background

The right to vote is one of the undeniable cornerstones of the Constitution.²⁶ The First Amendment restricts federal encroachment on individuals' freedom of association, which is also insulated from states' intrusion under the Fourteenth Amendment.²⁷ Moreover, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined."²⁸ Yet, for nearly as long as the right to vote has existed, gerrymandering has infringed upon it.²⁹

A. How Gerrymandering Works

One of the few aspects of partisan gerrymandering courts and legal scholars can agree on is its definition: "[t]he practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."³⁰ This frequently leads to counterintuitive election results.³¹ For instance, as illustrated in Table 1 below, assume that a state with three electoral districts has two

26. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). The Court upheld the district court's actions in ordering a reapportionment of both houses of the state legislature because, "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." *Id.*

27. *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). Justice Black commented:

In the present situation[,] the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.

Id.

28. *Reynolds*, 377 U.S. at 560 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

29. See Niemeyer, *supra* note 2, at 249 (noting that "[t]he practice of drawing district lines to commandeer elections has existed in America since the colonial period").

30. *Vieth v. Jubelirer*, 541 U.S. 267, 271 n.1 (2004); *Political Gerrymandering*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016).

31. See Weiss, *supra* note 10, at 696 (commenting on how, because of partisan gerrymandering, a party can receive forty percent of the statewide votes yet only win thirty percent of the seats).

hundred ten citizens who always vote for the Democratic candidate and one hundred sixty-five citizens who always vote for the Republican candidate.³² One would initially assume that, because there are more Democratic voters, the Democratic Party would control a majority of the districts. However, legislators can draw district lines in such a way that District *A* has one hundred Democratic voters and twenty-five Republican voters, District *B* has fifty Democratic voters and seventy-five Republican voters, and District *C* has sixty Democratic voters and sixty-five Republican voters.³³ Under this scheme, even though Democrats make up a majority of the population, Republicans control a majority of the legislature.³⁴ Since district manipulation like this can be so effective, partisan gerrymandering is a ubiquitous and often abused tool of state legislatures.³⁵

Table 1. Hypothetical Districting Scheme

District	Democratic Voters	Republican Voters	Winning Party
A	100	25	Democratic
B	50	75	Republican
C	60	65	Republican
Total	210	165	

The method of voter distribution used above is commonly referred to as “packing and cracking.”³⁶ The legislative majority will try to burden the opposing party by “packing” a large number of the

32. *Infra* TABLE 1. This hypothetical is based on one that Weiss gave when describing how gerrymandering works in winner-take-all elections. Weiss, *supra* note 10, at 696. However, unlike Weiss’s, this example adheres to the legal requirement that each district have the same number of voters. *Id.*

33. *See id.*

34. *See id.*

35. *See* Stephanopoulos & McGhee, *supra* note 14, at 840. In recent years, peaking during the 2012 election cycle, reapportionment plans have shown a large disparity in party favoritism and vote-to-seat efficiency, namely in favor of Republicans. *Id.* at 831. “In fact, the plans in effect today are the most extreme gerrymanders in modern history.” *Id.*

36. *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004); Stephanopoulos & McGhee, *supra* note 14, at 851.

opposing party's voters into a few districts which that party will easily win.³⁷ The rest of the opposing party's voters are "cracked" and divided among many districts for them to narrowly lose.³⁸

Although packing and cracking votes is a common indicator of partisan gerrymandering cases,³⁹ not every packed and cracked redistricting plan is improper.⁴⁰ Constitutional districting principles that courts traditionally uphold include contiguity, compactness, and conformity with geographic features.⁴¹ Though not a guarantee, a plan that satisfies these factors will make it more likely to adhere to the "one person, one vote" principle that safeguards individuals' constitutional right to vote.⁴² However, the area between acceptable and excessive gerrymandering, even when traditional notions are employed, is gray and gives rise to litigation seeking a bright line.⁴³

B. *The Modern History of Gerrymandering*

Courts have consistently struggled and contradicted themselves not only in finding a means of determining if a district map unconstitutionally infringes on a group's voting rights but also in determining if the issue is justiciable.⁴⁴ Despite these troubles, a

37. *E.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018); *Stephanopoulos & McGhee*, *supra* note 14, at 851.

38. *E.g.*, *Vieth*, 541 U.S. at 343; *Stephanopoulos & McGhee*, *supra* note 14, at 851.

39. *See* *Davis v. Bandemer*, 478 U.S. 109, 116–17 (1986) (referring to the phenomenon as "stacking" and "splitting"). In their claims, the plaintiffs in *Vieth*, *League of United Latin Am. Citizens*, and *Whitford* all addressed the "packing" and "cracking" of a group of voters. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 409 (2006); *Vieth*, 541 U.S. at 272; *Whitford*, 218 F. Supp. 3d at 854.

40. *Weiss*, *supra* note 10, at 697.

41. *E.g.*, *Whitford*, 218 F. Supp. 3d at 888; *Weiss*, *supra* note 10, at 697 (listing "geographical contiguity, geographic compactness, preserving communities of interest, and nesting" among the other districting principles).

42. *Whitford*, 218 F. Supp. 3d at 888 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)) ("[Traditional districting principles] are constitutionally permissible, but not 'constitutionally required.'"). *Contra* *Davis*, 478 U.S. at 116 (finding the defendants' explanations for why their plan did not conform to traditional criteria—such as the adherence to the one person, one vote principle—inadequate).

43. *Whitford*, 218 F. Supp. 3d at 887. The Court also said that regardless of this ambiguity, "an intent to entrench a political party in power signals an excessive injection of politics into the redistricting process that impinges on the representational rights of those associated with the party out of power," which will satisfy the intent prong of an equal protection violation. *Id.* Therefore, the "intent to entrench a political party" may give some clarity to gerrymandering cases. *Id.*

44. *E.g.*, *Vieth*, 541 U.S. at 306. The plurality found that claims of partisan gerrymandering are a

justiciable standard eventually emerged; one that looks to the district plan's discriminatory intent, effect, and any justifications in defense of that effect.⁴⁵ Nevertheless, this intent-and-effect standard took many years to develop and is an amalgam of its failed predecessors.⁴⁶ *Baker v. Carr* marked one of the first major decisions in modern apportionment litigation.⁴⁷ The Supreme Court defied tradition and held malapportionment violations of the Equal Protection Clause justiciable—that is, federal courts may hear and decide such cases.⁴⁸

Nearly twenty-five years later, another challenge to a districting plan made its way to the Supreme Court.⁴⁹ In *Davis v. Bandemer*, the Supreme Court, with a six-Justice majority, held that partisan gerrymandering claims specifically presented a justiciable controversy.⁵⁰ However, the Court split when determining the correct standard to apply.⁵¹ The plurality said there is a violation when the

nonjusticiable political questions, stating that the finding of justiciability in *Davis* was mistaken. *Id.*

45. *Whitford*, 218 F. Supp. 3d at 884 (prohibiting “a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds”).

46. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 469 (2006) (Stevens, J., dissenting); *Davis*, 478 U.S. at 133 (“[A] finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”).

47. *Baker v. Carr*, 369 U.S. 186, 203–04 (1962) (holding an apportionment case may be reviewed on Fourteenth Amendment grounds as long as the grounds are independent from those of political questions); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 143 (5th ed. 2015); Niemeyer, *supra* note 2, at 254.

48. *Baker*, 369 U.S. at 228–30; CHEMERINSKY, *supra* note 47, at 47; see also U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .”). The Supreme Court had long held that challenges to the constitutionality of malapportioned state legislatures—often brought under the Guaranty Clause—were a political question not suitable for judicial review. *Baker*, 369 U.S. at 228. However, when those claims are brought under the Equal Protection Clause, they do not pose political questions unanswerable by the Court because, unlike the lack of judicially manageable standards under the Guaranty Clause, “[j]udicial standards under the Equal Protection Clause are well-developed and familiar.” *Id.* at 226, 228.

49. *Davis*, 478 U.S. at 113. Democratic voters contested Indiana’s 1981 reapportionment plan, passed by a Republican-controlled state legislature. *Id.* A district court found the reapportionment plan gave unfair advantage to Republicans and, as such, ruled in favor of the plaintiffs. *Id.*

50. *Id.* at 127; Stephanopoulos & McGhee, *supra* note 14, at 840. Although the Court concluded that the issue is justiciable, it reversed the district court’s finding that the plan was unconstitutional. *Davis*, 478 U.S. at 129–30. Though Democrats did not receive representation proportional to the statewide vote, the Court held that this “political fairness” principle does not mean that the Constitution requires it. *Id.* at 131. Additionally, a violation does not occur when a plan merely makes winning elections more difficult. *Id.* at 131–32.

51. Stephanopoulos & McGhee, *supra* note 14, at 840.

plaintiffs prove “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”⁵² Justice Powell, conversely, argued for a totality-of-the-circumstances approach that would consider traditional districting principles.⁵³

After another long gap, the Supreme Court again confronted the gerrymandering issue in *Vieth v. Jubelirer*.⁵⁴ The standard the Court attempted to construct in *Davis* proved so difficult to apply that using it would have “produced the same result . . . as would have [been] obtained if the question were nonjusticiable.”⁵⁵ The lack of a judicially discernible and manageable standard led the plurality in *Vieth* to backtrack and declare all gerrymandering claims nonjusticiable political questions,⁵⁶ despite the many standards presented to and created by the Court.⁵⁷ Further, Justice Kennedy left

52. *Davis*, 478 U.S. at 133 (“[S]uch a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”). Proving a redistricting plan’s discriminatory intent and effect may evidence an Equal Protection violation because such a violation occurs when the electoral system consistently and “substantially disadvantages certain voters in their opportunity to influence the political process effectively.” *Id.* at 133.

53. *Id.* at 138 (Powell, J., concurring in part and dissenting in part). Justice Powell pointed to key factors like the configurations of the districts, the observance of political subdivision lines, the nature of the procedures by which the apportionment law was adopted, and the legislative history reflecting contemporaneous legislative goals. *Id.*

54. *Vieth*, 541 U.S. at 271–72. Democrats registered to vote in Pennsylvania contended that the districts created by legislative and executive officers served for no other reason than “for the sake of partisan advantage.” *Id.* at 272–73.

55. *Id.* at 279; Stephanopoulos & McGhee, *supra* note 14, at 841. This difficulty came from *Davis*’s requirement of consistent degradation of voters’ rights, which ultimately caused claims presented “prior to the first election under a plan, or even after one or two elections,” to universally fail. Stephanopoulos & McGhee, *supra* note 14, at 840–41. It also stemmed from many courts’ recognition that challenges to a plan were not sufficient if founded solely on electoral disadvantage. *Id.* at 841.

56. *Vieth*, 541 U.S. at 281 (“[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are non-justiciable and that *Davis* was wrongly decided.”). *Contra Davis*, 478 U.S. at 127 (“[T]he political gerrymandering claim in this case is justiciable . . .”).

57. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .”); Stephanopoulos & McGhee, *supra* note 14, at 841. Appellants in *Vieth* proposed a standard that requires the plaintiff show predominant partisan intent, systematic packing and cracking of a party’s voters, and a party’s inability to translate a majority of its votes into a majority of seats. *Id.* at 841. Justice Souter recommended a multi-factor, burden-shifting test that considered the following: (1) whether the plaintiff belonged to a cohesive political group; (2) whether the plaintiff’s district of residence conformed to traditional districting criteria; (3) whether specific correlations between the

the door open for new standards that may deem partisan gerrymandering justiciable in the future.⁵⁸ This disagreement in the Court left the law ambiguous and further compounded the challenges presented by gerrymandering claims.⁵⁹

Despite the troubles of *Vieth*, *League of United Latin Am. Citizens v. Perry* (LULAC) gave promise to the idea of justiciable gerrymandering cases.⁶⁰ To establish their claim, the plaintiffs employed a partisan symmetry standard that measures “partisan bias” by “compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote.”⁶¹ Even though the Court ultimately rejected the partisan symmetry standard’s applicability to this case because it was too hypothetical and not a reliable enough measure for determining a threshold on partisan dominance, a majority of the Justices expressed belief that it is possible to find a judicially discernable and manageable standard.⁶²

district’s nonconformity for those criteria and his group’s population distribution exist; (4) whether there was a hypothetical map of the plaintiff’s district where the proportion of the plaintiff’s group was higher or lower and conformed more with traditional criteria than the actual map; and (5) whether the defendant intentionally manipulated the district’s shape to pack or crack the plaintiff’s group. *Vieth*, 541 U.S. at 347–50 (Souter, J., dissenting).

58. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). While agreeing with the plurality that the plaintiffs failed to establish a claim, “[Justice Kennedy] would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” *Id.*

59. Weiss, *supra* note 10, at 700. Notwithstanding the plan’s discriminatory intent, the district court dismissed the claim because the plaintiffs failed to allege a sustainable argument for the plan’s discriminatory effect on Democratic voters. *Id.* at n.47.

60. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410 (2006) (holding that part of the Texas redistricting plan violated the Voting Rights Act). Texas Democrats brought this suit in 2002 because a Republican-controlled government enacted a mid-decennial redistricting that gave Republicans a supermajority. *Id.* at 412. The plan was very successful and caused the Texas delegation to go from having seventeen Democrats and fifteen Republicans in the 2002 election to having only eleven Democrats and twenty-one Republicans in the 2004 election. *Id.* at 412–13. Before this case arrived at the Supreme Court, the district court dismissed it and noted that while the only purpose of the Texas legislature’s enactment of the plan was to gain partisan advantage, a lack of a manageable standard hindered the claim’s success. *Session v. Perry*, 298 F. Supp. 2d 451, 474 (E.D. Tex. 2004).

61. Brief of Amici Curiae Professors Gary King, et al., in Support of Neither Party at *5, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (No. 05-204), 2006 WL 53994. Plaintiffs also proposed a “sole-intent” standard, arguing that mid-decade redistricting for openly partisan reasons provided a reliable standard for the Court to use. *Id.*

62. *League of United Latin Am. Citizens*, 548 U.S. at 420 (stating that the Court is “wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs”); Stephanopoulos & McGhee, *supra* note 14, at 842–44. Several justices, particularly Justice Stevens, advocated for a more developed and precise form of partisan symmetry. *League of*

C. *The Current State of Affairs*

1. *The Efficiency Gap*

Recognizing the possibilities for developing a legal test that the Supreme Court would accept, Nicholas Stephanopoulos, a professor at the University of Chicago Law School, and Eric M. McGhee, a political scientist, ventured to do just that in 2015 when they developed the EG.⁶³ The goal of partisan gerrymandering—winning as many legislative seats as possible with a certain amount of votes—is best achieved when a party’s votes are translated into seats more efficiently than the opponent’s, usually through packing and cracking.⁶⁴ The EG focuses on this efficiency, or lack thereof, by analyzing the number of wasted votes a single-member district inevitably produces in every election.⁶⁵ Wasted votes are any votes that do not contribute to a victory.⁶⁶ Wasted votes include any vote for a losing candidate and votes cast for a winning candidate in surplus of the number needed to win—fifty percent of the votes plus one.⁶⁷ The differences between each parties’ respective wasted votes are then divided by the total number of votes cast in the election to generate a percentage.⁶⁸ Therefore, the more wasted votes a party has, the less effectively it has translated its votes into representation, and the more systematically disadvantaged it is compared to the other party.⁶⁹ The EG merely represents this inefficiency in a single number.⁷⁰

United Latin Am. Citizens, 548 U.S. at 468 (Stevens, J., dissenting). Justice Stevens proposed that (1) a sufficiently large deviation from symmetry is a *prima facie* case of unconstitutionality, and (2) the burden then shifts to defendant to prove there are legislatively justified reasons for this asymmetry. *Id.*

63. Stephanopoulos & McGhee, *supra* note 14, at 831.

64. *Id.* at 850–51.

65. *Id.* at 850.

66. *Id.* at 851.

67. *Id.* Votes cast for a losing candidate stem from their voters being “cracked”; excess votes cast for a winning candidate result from “packed” voters. *Id.* at 850.

68. Stephanopoulos & McGhee, *supra* note 14, at 850.

69. *Id.* at 850.

70. *Id.*

The EG aggregates a district's wasted votes "into a single, tidy number."⁷¹ It calculates the net number of wasted votes and divides it by the total number of votes cast.⁷² Stephanopoulos and McGhee suggest applying an EG threshold of eight percent to a districting plan, above which is indicative of "severe gerrymandering."⁷³ However, this threshold is merely a suggestion that the Supreme Court has discretion to change or even eliminate altogether.⁷⁴ The Court has the option to simply "strike down plans with extremely high efficiency gaps and to uphold plans with very low gaps" and develop a threshold from there.⁷⁵ Stephanopoulos and McGhee also stress that it is simply a measure of a specific mechanism behind partisan gerrymandering and not a complete legal test in and of itself.⁷⁶ Thus, determining a plan's discriminatory effect on a certain

71. *Id.* at 834.

72. *Id.* at 851–53. Total Democratic/Republican Wasted Votes – Total Republican/Democratic Wasted Votes = Total Wasted Votes. *Id.* Efficiency Gap = (Total Democratic/Republican Wasted Votes – Total Republican/Democratic Wasted Votes) ÷ Total Votes. Stephanopoulos & McGhee, *supra* note 14, at 851–53. The EG can also be calculated using either party's seat and vote margin, if known. *Id.* Vote margins are the percentages of the statewide vote received, and seat margins are the seats won by one party. *Id.* That calculation looks like this: Efficiency Gap = (Seat Margin – 50%) – 2 (Vote Margin – 50%). *Id.* This assumes that all districts are equal in population, as constitutionally required, and that there are only two parties competing in a given election, which is common in single-member-district elections. *Id.*

73. *Id.* at 888–89. Stephanopoulos and McGhee calculated the EGs of state house plans over the past fifty years and placed plans with EGs of more than eight percent in the worst twelve percent of all plans. Stephanopoulos & McGhee, *supra* note 14, at 888. They found that several states' plans repeatedly produced extremely high efficiency gaps. *Id.* For instance, "Alabama, Georgia, Idaho, New York, South Carolina, and Texas did so in the 1970s; Alabama (both plans), Georgia, Idaho (both plans), and Mississippi in the 1980s; Idaho, Illinois, Nevada, Ohio (second plan), and Wyoming in the 1990s; and Florida, Ohio, and Vermont in the 2000s." *Id.* at 889.

74. *Id.* at 890–91. The Supreme Court can set the threshold as high or low, or as strictly or loosely, as it wants depending on the circumstances presented. *Id.* Additionally, the Supreme Court and lower courts have discretion to simply "strike down plans with extremely high efficiency gaps and to uphold plans with very low gaps" and develop a threshold from there if the Court's lack of experience using the measure causes some apprehension. *Id.* at 890. This is similar to what the Court did with several reapportionment cases from 1967 to 1975 when it invalidated plans with higher population deviations of twenty percent or more while sustaining those with lower deviations of ten percent or less. Stephanopoulos & McGhee, *supra* note 14, at 890–91.

75. *Id.* at 890.

76. *Id.* at 892 ("On the merits as well, [Stephanopoulos & McGhee] believe that a rule of automatic invalidity for plans with excessive gaps would assign too high a premium to partisan fairness."); see also McGhee, *supra* note 17.

political group's voting rights should also give equal credence to other traditionally important values.⁷⁷

2. *Whitford v. Gill*

In 2011, the Wisconsin legislature swiftly drafted and enacted a new redistricting plan, Act 43. The governor signed the Act a little more than a month after it was first introduced.⁷⁸ The subsequent state election results show the Act at work. In the 2012 election, Republicans received nearly three percent less of the statewide vote, yet secured twenty-four more seats than Democrats.⁷⁹ The 2014 election continued to show Republican dominance when Republicans enjoyed a twenty-seven seat advantage while only getting four percent more votes than their opponents.⁸⁰ Consequently, Whitford, on behalf of twelve members of Wisconsin's Democratic Party, filed suit against Gill, a member of the Wisconsin Elections Committee, claiming that Act 43 constitutes unconstitutional partisan gerrymandering.⁸¹ The plaintiffs established that the plan unfairly reduced Democratic voters' statewide electoral influence, that Act 43 was purposefully designed to solidify Republican control in the

77. Stephanopoulos & McGhee, *supra* note 14, at 892 (listing principles like compactness, respect for political subdivisions, respect for communities of interest, competitiveness, and minority representation).

78. *Whitford v. Gill*, 218 F. Supp. 3d 837, 846–48, 853 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). Wisconsin's legislative election in 2010 marked the first time in forty years where there was a Republican majority in the assembly, a Republican majority in the senate, and a Republican Governor. *Id.* at 846. In January 2011, Scott Fitzgerald, Wisconsin Senate Majority Leader, and Jeff Fitzgerald, Speaker of the Wisconsin Assembly, created a coalition of staff members, professors, and attorneys to start working on a reapportionment plan for the state's legislative districts. *Id.* at 846–48. After several months of development, the plan was introduced by the Committee on Senate Organization on July 11, 2011. *Id.* at 853. The senate and assembly passed the Act on July 19, 2011, and July 20, 2011, respectively. *Id.* The Governor signed the Act on August 23, 2011. *Id.*

79. *Whitford*, 218 F. Supp. 3d at 899–901. Specifically, the Republicans garnered 48.6% of the vote, but secured sixty seats in the assembly. *Id.* at 899. Comparatively, the Democrats received 51.4% of votes, but only secured thirty-nine seats. *Id.* at 901.

80. *Id.* More precisely, Republicans acquired 52% of the vote and got sixty-three seats. *Id.* at 899. That same election saw Democrats' vote share decrease to 48% and their seat share drop to thirty-six. *Id.* at 901.

81. *Whitford*, 218 F. Supp. 3d at 843. The Campaign Legal Center, with Whitford as the lead plaintiff, filed this suit against Gill, the chairman of the state elections board, claiming that Act 43 violates their First and Fourteenth Amendment rights because the Act systematically dilutes Democratic voter strength in comparison to their Republican counterparts. *Id.* at 855.

legislature, and that adopting a different map would remove the impediment on Democratic voters and redress the constitutional violation.⁸² Having satisfied the standing requirements, the district court agreed to hear the plaintiffs' case.⁸³

The district court stated that the First and Fourteenth Amendments "prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds."⁸⁴ By looking to the Republicans' mapmaking process and the new district lines, the plaintiffs met the discriminatory intent requirement and showed that the Republicans injected an excessive amount of politics into the redistricting process to impinge on the Democrats' representational rights.⁸⁵ In proving Act 43's discriminatory effect, the plaintiffs employed the EG as a key factor in their analysis.⁸⁶ Using a calculation "simplified method,"⁸⁷ the trial expert found a pro-Republican EG of thirteen percent in 2012 and a pro-Republican EG of ten percent in 2014.⁸⁸ The burden then shifted to the defendant to prove that other legislative considerations justified the Act's

82. *Id.*

83. *Id.* at 56.

84. *Id.* at 884.

85. *Id.* at 887 n.170 (dictum) ("The intent we require, therefore, is not simply an 'intent to act for political purposes,' but an intent to make the political system systematically unresponsive to a particular segment of the voters based on their political preference (citation omitted)."). The plaintiffs produced evidence that legislative drafters devised multiple alternative maps to determine the electoral effects of different district lines. *Whitford*, 218 F. Supp. 3d at 891. Each of these maps was more favorable to Republicans than the last and resulted in a higher number of "safe" and "leaning" Republican districts. *Id.* at 891–92. The map ultimately enacted was the one that most significantly increased the number of Republican-leaning districts, even though several alternative maps would have still yielded a Republican majority while resulting in a less severe partisan outcome. *Id.* at 897.

86. *Id.* at 854. The plaintiffs also relied on the vote and seat share statistics derived from the 2012 and 2014 elections. *Id.* at 905–06. These actual election results overcame the flaws the Supreme Court worried about when assessing the plaintiffs' hypothetical election results under a less partisan regime in cases like *Davis* and *League of United Latin Am. Citizens*. *Id.* at 903.

87. Stephanopoulos & McGhee, *supra* note 14, at 851–53. Efficiency Gap = (Total Democratic/Republican Wasted Votes – Total Republican/Democratic Wasted Votes) ÷ Total Votes. *Id.*

88. *Whitford*, 218 F. Supp. 3d at 904–05. Based on historical data of single-district, simple-plurality systems like Wisconsin, trial experts found that for every one percent increase in a party's vote share, its seat share will increase by two percent. *Id.* at 904. This ratio was then used in calculating the EGs. *Id.* at 905.

effect.⁸⁹ The district court ultimately rejected the defendant's arguments that Wisconsin's political geography accounted for Act 43's discriminatory effect because the impact of the state's pro-Republican geography is too minuscule to overcome the weight of the plaintiffs' evidence.⁹⁰ Accordingly, the court rendered judgment in favor of the plaintiffs.⁹¹

On appeal, the Supreme Court found the plaintiffs lacked standing because their suit concerned generalized "group political interests, not individual legal rights" to vote.⁹² The Court then remanded the case to allow the plaintiffs to prove the individualized burden on their votes.⁹³ Justice Kagan's concurrence explicitly details what the majority only alludes to: The ability of plaintiffs to have standing against a statewide gerrymander, and the EG's ability to adequately measure partisan asymmetry and provide evidence of unconstitutionality that warrants statewide judicial relief.⁹⁴

D. Georgia's Perspective

The Georgia General Assembly makes up Georgia's legislative branch with the house's 180 members being elected from single-member-districts.⁹⁵ Despite enacting a district plan in 2012,⁹⁶ the legislature redrew the map in 2015 under Georgia House Bill 566.⁹⁷

89. *Id.* at 910.

90. *Id.* at 912, 923–24. In addition to arguing that Wisconsin's political geography naturally packs and cracks Democratic voters in and around urban centers, the defendant emphasized the Act's accordance with traditional districting criteria. *Id.* at 911, 919. Recognizing that "compliance with traditional districting principles [does not] necessarily create[] a constitutional 'safe harbor' for state legislatures," the district court also rejected this argument of the defendant. *Whitford*, 218 F. Supp. 3d at 912.

91. *Id.* at 843.

92. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018).

93. *Id.* at 1934.

94. *Id.* at 1937 (Kagan, J., concurring).

95. GA. CONST. art. III, § II, para. 1; Ga. State Conference of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1270 (N.D. Ga. 2017). Georgia's legislative elections require a candidate receive a majority of the vote. *NAACP*, 269 F. Supp. 3d at 1270. If that majority is not attained, then a runoff will be held between the two candidates with the most votes. *Id.* at 1270–71.

96. *NAACP*, 269 F. Supp. 3d at 1271. Following the norm of implementing redistricting plans after every census, Georgia's 2012 plan was based on the most recent census data. *Id.*

97. *Id.*; H.B. 566, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015). In addition to excluding African-American legislators, minority residents were also denied the ability to publicly comment on it, the district court "accept[ed] the complaint's allegation that Georgia House Bill 566 redrew district lines to

African-American legislators were excluded from the drafting process and were not allowed input on the issue.⁹⁸ In response, a suit was filed in the United States District Court for the Northern District of Georgia.⁹⁹ The suit focused on state districts 105 and 111 as newly redrawn under Georgia House Bill 566 and claimed that the plan unconstitutionally partisan gerrymanders those districts.¹⁰⁰ Having determined justiciability, the district court relied on the same three-pronged “intent, effect, and justification” standard used in *Whitford*.¹⁰¹ Although the plaintiffs showed discriminatory intent, they failed to show a discriminatory effect by not proffering a judicially manageable standard.¹⁰² However, if such effect can be proven, Georgia House Bill 566 may indeed be an unconstitutional partisan gerrymander.

II. Analysis

One aspect of gerrymandering the Supreme Court does agree on is that “an excessive injection of politics” into the redistricting process

make certain districts safer for white Republican incumbents.” *NAACP*, 269 F. Supp. 3d at 1271.

98. *NAACP*, 269 F. Supp. 3d at 1271.

99. See generally *id.* at 1266.

100. *Id.* at 1270, 1273 (alleging that Georgia House Bill 566 also constitutes racial gerrymandering in violation of the Fourteenth and Fifteenth Amendments). Plaintiffs contend that, because of Georgia House Bill 566, they “did not have an equal opportunity to elect a candidate of their choice in 2016, and that they will continue to be so deprived in the 2018 or 2020 elections.” *Id.* at 1273. Plaintiffs also alleged that Georgia House Bill 566 intentionally removed Democratic voters from Districts 105 and 111 to make them uncompetitive and ensure a Republican victory. *Id.*

101. *Whitford v. Gill*, 218 F. Supp. 3d 837, 884, 928 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018); *NAACP*, 269 F. Supp. 3d at 1281–82. The District Court for the Northern District of Georgia district court looked to *Davis*, *Vieth*, and *LULAC* and concluded that because the Supreme Court has upheld the justiciability of partisan gerrymandering cases in the past, this case is also justiciable under current case law. *NAACP*, 269 F. Supp. 3d at 1281–82. Looking to the standard in *Whitford* based around the concept of entrenchment, the district court said a redistricting scheme is unconstitutional when it “(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate grounds.” *Id.*

102. *NAACP*, 269 F. Supp. 3d at 1278–79, 1284. Under the 2012 plan, District 105’s voting population for Caucasians and African-Americans was 48.4% and 32.4% respectively. *Id.* at 1271. Under the Georgia House Bill 566 plan, that same population changed to 52.7% Caucasian and 30.4% African-American. *Id.* Similarly, in 2012, District 111 was 56.1% Caucasian and 33.2% African-American, and was 58.1% Caucasian and 31% African-American in 2014. *Id.* at 1272. However, instead of engaging any sort of standard or metric, the plaintiffs only made conclusory allegations that defendants minimized the voting strength of Democrats. *Id.* at 1285.

violates the Constitution.¹⁰³ From this uniform recognition, specific elements of constitutionality have repeatedly emerged.¹⁰⁴ At the core of these elements is the need to show: (1) the plan's intent to discriminate against an identifiable group's voting power; (2) the plan actually has that result; and (3) that no legitimate legislative purpose can justify that effect.¹⁰⁵ Thus, a plan may still be constitutional if it satisfies the Court's other factors even though its EG is above the threshold.¹⁰⁶ This standard's success heavily depends on the effects prong—how to identify when an injection of politics is excessive.¹⁰⁷ That is precisely what the EG was created to do.¹⁰⁸

A. The Efficiency Gap's Strengths and Weaknesses

1. Addressing the Court's Concerns

Stephanopoulos and McGhee hold the EG out not as a broad legal test, but as a precise measure of efficiency “across a wide range of outcomes” that corresponds to a plan's partisan fairness.¹⁰⁹ Any district plan's EG can be calculated regardless of the level of

103. *Vieth v. Jubelirer*, 541 U.S. 267, 287–88, 293 (2004) (emphasis omitted); *see also* *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (“[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.”).

104. *See* *Davis*, 478 U.S. at 127 (agreeing with the lower courts that “in order to succeed the *Bandemer* plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group”); *Whitford*, 218 F. Supp. 3d at 871 (“[A] successful political gerrymandering claim must include a showing of both discriminatory intent and discriminatory effect.”).

105. *Whitford*, 218 F. Supp. 3d at 884, 928; *NAACP*, 269 F. Supp. 3d at 1282; Brief of Bernard Grofman & Ronald Keith Gaddie, *supra* note 10, at *8 (“The Court should adopt a test for unconstitutional gerrymandering that requires a showing of three specific elements: partisan asymmetry, lack of responsiveness, and causation.”).

106. Stephanopoulos & McGhee, *supra* note 14, at 892 (“On the merits as well, we believe that a rule of automatic invalidity for plans with excessive gaps would assign too high a premium to partisan fairness.”).

107. Justin Levitt, *Symposium: Intent Is Enough*, SCOTUSBLOG (Aug. 9, 2017, 10:44 AM), <http://www.scotusblog.com/2017/08/symposium-intent-enough/> [<https://perma.cc/P54T-2KDX>]; *see also* *Vieth*, 541 U.S. at 281 (“[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”).

108. *See* McGhee, *supra* note 17.

109. Stephanopoulos & McGhee, *supra* note 14, at 854; McGhee, *supra* note 17 (“We folded the EG into a possible legal test: a set of rules that clearly articulates how to weigh competing interests and principles in a wide range of situations so justice is as swift and certain as possible.”).

electoral dominance one party enjoys.¹¹⁰ The EG is applicable to districts so dominated by a single party that redistricting previously seemed futile and, as such, can rebut arguments that gerrymandering claims are only important in electoral systems where a plan could affect legislative control.¹¹¹ This feature is particularly advantageous given the Republican Party's pronounced control in Georgia.¹¹² The EG also addresses concerns that the Court expressed in *Davis*, *LULAC*, and *Vieth*.¹¹³ For example, Justice Kennedy feared adopting the standard in *LULAC* because it speculatively calculated a plan's partisan bias before elections were even held under the plan.¹¹⁴ The EG avoids this issue by relying on actual election results as opposed to hypothetical ones.¹¹⁵

On the other hand, the EG's reliance on concrete election results may give new plans a beneficial grace period where they are enforced and unchallenged until one or more elections are held and enough data is finally generated.¹¹⁶ Still, the potential for litigation of these

110. Stephanopoulos & McGhee, *supra* note 14, at 855. Districts and states where one party has such a great political advantage "have been shielded from [judicial] scrutiny" because it is thought that no redistricting plan, no matter how much it modifies districts, would change the legislature. *Id.* An example of such is Wyoming, where the Republican Party was the majority of both the state's house and senate every year from 1992 to 2013. *Wyoming State Legislature*, BALLOTPEdia, https://ballotpedia.org/Wyoming_State_Legislature [<https://perma.cc/8NLH-24YA>] (last visited Dec. 20, 2017).

111. Stephanopoulos & McGhee, *supra* note 14, at 855. The position that the EG is inapplicable to heavily gerrymandered districts is too restrictive, especially for states like California that require a supermajority to pass legislature. *Id.*

112. See GA. SEC'Y OF STATE, *General Election: November 8, 2016*, <http://results.enr.clarityelections.com/GA/63991/184321/en/summary.html> [<https://perma.cc/MXZ3-RDR2>] (last updated Dec. 1, 2016 2:06 PM) [hereinafter *General Election 2016*] (showing that, in 2016, only sixty-two of Georgia's one hundred eighty house districts voted for a Democratic representative and only four congressional representatives from Georgia are Democrats).

113. Stephanopoulos & McGhee, *supra* note 14, at 848–49.

114. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006) (Kennedy, J.) (plurality opinion) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."); Stephanopoulos & McGhee, *supra* note 14, at 856. To reiterate, partisan bias is the divergence in how many seats each party would win if each was allotted the same percent of statewide votes. *League of United Latin Am. Citizens*, 548 U.S. at 420. For instance, if, under Georgia House Bill 566, Republicans would win 55% of Georgia's seats with only 50% of Georgia's votes, then the Bill would have a pro-Republican bias of 5%. See Stephanopoulos & McGhee, *supra* note 14, at 856.

115. Stephanopoulos & McGhee, *supra* note 14, at 896 ("We have used only past election outcomes—not predicted future ones—to calculate the efficiency gap.").

116. See *id.* at 897 ("Even if the threat of litigation was an election cycle away, it still would be proximate enough to produce compliance in most cases.").

plans may discourage legislators from enacting them in the first place.¹¹⁷ Justice Kennedy was also hesitant about solely basing unconstitutionality on asymmetrical partisanship.¹¹⁸ The EG, as a metric of asymmetry, calculates only that.¹¹⁹ A broader legal test should also implement other measures to account for what the EG does not.¹²⁰ This is where traditional districting principles would weigh for or against an initial finding of a large EG.¹²¹

2. *Instability*

Although addressing many past concerns, the EG still faces several limitations. For one, it suffers from long-term instability.¹²² Though it is theoretically possible for a district's EG to remain constant throughout a plan's life, the EG is more likely to fluctuate in actuality.¹²³ A district's EG may vary due to shifts in voting proportions based on mass voter relocation, changes in voters' political ideologies, or voters supporting other parties for reasons unrelated to party affiliation, like a candidate's personal qualities.¹²⁴

117. *Id.* Although the plans are abandoned immediately after the first election, the partisan advantage under the plan would also be abandoned, "communities might be destabilized, competitiveness might surge, and incumbents might be imperiled." *Id.*

118. *League of United Latin Am. Citizens*, 548 U.S. at 420 (Kennedy, J.) (plurality opinion) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results [A]symmetry alone is not a reliable measure of unconstitutional partisanship.").

119. McGhee, *supra* note 17 ("It does not directly measure (among other things) majority party entrenchment, competitiveness, racial or ethnic minority representation, district shapes, the durability of any partisan advantage, or whether the redistricting authority intended to benefit either party when it drew the maps. But a good measure does not try to bite off more than it can chew.").

120. Stephanopoulos & McGhee, *supra* note 14, at 898 (advocating for a two-stage analysis where first the plan's asymmetry is measured using the EG, and is balanced against other factors in the second stage to see if it was necessary for the gap to exceed the relevant threshold).

121. *Id.* (pointing to criteria such as respect for political subdivisions, the underlying political geography, compactness, and other oft-cited principles).

122. Brief of Amici Curiae Judicial Watch, Inc. & Allied Educ. Found. in Support of Appellants at 6–8, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161) [hereinafter Brief of Amici Curiae Judicial Watch]; Stephanopoulos & McGhee, *supra* note 14, at 864.

123. Brief of Amici Curiae Judicial Watch, *supra* note 122, at 6–8; Stephanopoulos & McGhee, *supra* note 14, at 864 (stating that when the EG was first used it "showed that most redistricting plans are volatile enough that their precise consequences cannot be forecast with great accuracy"). "The mathematical tool for predicting the fair translation of votes to seats in single-member districts is the 'S' curve," but the value of the formula on which the "S" curve is based is empirically determined from estimations of real-world elections, which significantly vary. Brief of Amici Curiae Judicial Watch, *supra* note 122, at 3–4.

124. Brief of Amici Curiae Judicial Watch, *supra* note 122, at 13 ("Deviations from proportional

Such volatility makes it difficult to predict the impact of future elections, and, consequently, a district's EG in the long run.¹²⁵

Moreover, the EG's dependence on the efficiency by which votes are translated into seats may represent "hyperproportionality." This is neither a constitutional right nor a useful means of calculating gerrymandering because not every divergence from proportionality is the product of unconstitutional political maneuvering.¹²⁶ Some maps with large, durable EGs may consistently advantage one party.¹²⁷ Still, others with smaller EGs continue to suffer from instability.¹²⁸

Using sensitivity testing to determine the probability that a particular result will remain true may resolve some stability problems.¹²⁹ Sensitivity testing would involve uniformly shifting the vote shares of each party in one election to yield a spectrum of possible results that show how the EG could change in future elections and the probability that an EG will persist.¹³⁰ While sensitivity testing may reduce some volatility concerns, it will not eliminate them, and it does not foreclose the possibility that significant changes in voting may severely alter the plan's EG for the worse.¹³¹

representation, however defined, may occur for any number of reasons other than gerrymandering.").

125. Stephanopoulos & McGhee, *supra* note 14, at 864; Levitt, *supra* note 107 (noting that the performance of a plan in previous elections does not necessitate a similar result in future elections).

126. Brief of Amici Curiae Judicial Watch, *supra* note 122, at 14–15; *see also* Davis v. Bandemer, 478 U.S. 109, 132 (1986) ("[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause."). Although the EG would not require strict, one-to-one proportional representation, it "would limit deviations from whatever level of representation was required by the 'S' curve," which is essentially just another form of proportional representation. Brief of Amici Curiae Judicial Watch, *supra* note 122, at 13.

127. Stephanopoulos & McGhee, *supra* note 14, at 864–65. State house plans like Idaho's have proven very stable because that state's EG has always been enormously pro-Republican. *Id.* at 882–84. Since 1970, Idaho's EG remained above ten percent, stretching to seventeen percent at its height. *Id.*

128. *Id.* at 864–65.

129. *See Statistical Test*, WOLFRAM, <http://mathworld.wolfram.com/StatisticalTest.html> [<https://perma.cc/T849-F7Z6>] (last visited Dec. 20, 2017).

130. Stephanopoulos & McGhee, *supra* note 14, at 874. Stephanopoulos and McGhee chose the scale and direction of voting shifts based on levels of shifts that historically occurred in most prior elections. *Id.* The result was shifts of 7.5% in either direction for Congress and 5.5% in either direction for state houses. *Id.*

131. Brief of Amici Curiae Judicial Watch, *supra* note 122, at 13–15.

3. *Uncontested Districts*

The EG's biggest limitation is its sensitivity to uncontested districts, which decreases its accuracy.¹³² This shortcoming is particularly relevant here because so many Georgia districts go uncontested.¹³³ Again, the number of votes each party wastes is central to the EG.¹³⁴ So, when a party needs only one vote to win, wasted votes become harder to capture.¹³⁵ Determining how many voters a plan packs and cracks through wasted votes inherently requires distinguishing between voters' preferences and identifying the party for which voters vote.¹³⁶

For example, in a district where there is only chicken and pork, Smith prefers to eat chicken. A new disease, however, recently eradicated all chickens in the district. Though Smith still prefers chicken, he can now only eat pork because that is the only food available; he has no choice. Like Smith, voters in uncontested districts have no other option but to vote for the one and only candidate running.¹³⁷ A lack of choice offers voters no opportunity to show their political preferences, making it nearly impossible to identify how much a plan packs and cracks.¹³⁸ Smith and everyone else who favor chicken over pork would surely eat chicken if possible, which would change the total amount of pork and chicken eaten. The results of an uncontested race would similarly change if it were contested.¹³⁹ While the same candidate may still win and pork may still be more popular, the number of votes for the winner and the amount of pork eaten would in all likelihood be lower.¹⁴⁰

132. Stephanopoulos & McGhee, *supra* note 14, at 865–66.

133. See *General Election 2016*, *supra* note 112. One hundred forty-nine of Georgia's 180 districts went uncontested in the 2016 state house election. *Id.*

134. See Stephanopoulos & McGhee, *supra* note 14, at 849–50.

135. See *id.* at 865.

136. *Id.* (affirming that not knowing how many people in each district vote for each party presents a “tricky problem for any measure of gerrymandering”).

137. *Id.* (“[T]he notion of support hinges on freedom of choice: voters must be able, in principle, to select more than one option.”).

138. *Id.*

139. *Id.*

140. Stephanopoulos & McGhee, *supra* note 14, at 865.

An accurate and complete EG analysis cannot disregard uncontested races or treat those races as if there was unanimous support for the unopposed party.¹⁴¹ One can examine past contested elections in the district and apply the results to the current uncontested election to try to avoid this dilemma.¹⁴² Alternatively, a specific vote share can be assigned to the unrepresented party.¹⁴³ But this obviously imposes imprecise and hypothetical measurements on a standard that already suffers from similar criticism. A more accurate technique is to gather voting data from federal elections, like presidential races, and use those outcomes to create a mean vote share for the party.¹⁴⁴ Regardless of the method used, the result is still one based on assumption, and though the EG is largely a firm and practicable standard, this adds to its faults.

B. Analysis of Georgia House Bill 566

Enacted in 2015, House Bill 566 is Georgia's most recent redistricting plan that shifted many voting lines.¹⁴⁵ Using the same standards as *Whitford v. Gill*, House Bill 566 is unconstitutional if three elements are shown: (1) the plan was intentionally enacted to discriminate against a political group and impede its voting effectiveness; (2) the plan has that effect; and (3) the plan's effect is not justified on other legitimate legislative grounds.¹⁴⁶

1. Intent

Contrary to using the EG to show discriminatory effect, a showing of intent is less direct and clear-cut.¹⁴⁷ When one party creates a new

141. *Id.* at 867.

142. *Id.* at 866.

143. *Id.* at 866–67.

144. *Id.* at 867.

145. H.B. 566, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015) (revising the borders of seventeen districts).

146. *E.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

147. *See id.* at 884–85. Determining when discriminatory intent is excessive is an “open question” because “some level of partisanship is permissible, or at least inevitable, in redistricting legislation.” *Id.* at 885.

map, it is almost always intended to favor the majority party and disfavor the other.¹⁴⁸ Currently, it is in the controlling party's interest to draft schemes that will continue to favor it.¹⁴⁹ Thus, the intent required for this first prong usually is easily met.¹⁵⁰

Looking at the mapmaking process will shed light on its intent.¹⁵¹ Though districting plans are ordinarily adopted after the census, a Republican legislature passed House Bill 566 in the middle of the decennial cycle.¹⁵² It was also quickly enacted, passing both the house and the senate less than a month after being first introduced.¹⁵³ The exclusion of African-American legislators from the districting process further evidences the Bill's discriminatory intent.¹⁵⁴ Although political affiliation is not necessarily determinable by race, party and race have a strong correlation in Georgia.¹⁵⁵ Of the 119 Republican members of the state house, none are African-American, and only one is not Caucasian.¹⁵⁶ On the other hand, seventy-five percent of House Democrats are African-American.¹⁵⁷ Thus, it is not a stretch to infer that all African-Americans barred from the drafting process were Democrats. Although some minority residents were not allowed public comment on the Bill,¹⁵⁸ this race-based exclusion is not as easily equated to a party-based one due to the lack of data about those residents and the lack of data suggesting strong

148. See Brief for Appellants at 63, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

149. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 474 (2006) (Stevens, J., concurring in part and dissenting in part). Justice Stevens conceded "that legislatures will always be aware of politics and that [the Court] must tolerate some consideration of political goals in the redistricting process." *Id.*

150. See *id.*; Weiss, *supra* note 10, at 722.

151. See *Whitford*, 218 F. Supp. 3d at 891–92. Drafters devised multiple alternative maps to determine the electoral effects of different district lines with each being more favorable to Republicans than the last. *Id.*

152. Ga. State Conference of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1271 (N.D. Ga. 2017).

153. See H.B. 566, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

154. Compare *NAACP*, 269 F. Supp. 3d at 1271 (finding that "African-American legislators were excluded from the process of drawing and negotiating"), with *Whitford*, 218 F. Supp. 3d at 894 (finding discriminatory intent where drafters of Act 43 solely sought help from Republican members of the assembly and only presented the final plan at the Republican caucus).

155. See *NAACP*, 269 F. Supp. 3d at 1271.

156. *Id.*

157. *Id.*

158. *Id.*

correlations between a person's minority status and political affiliation.

More information on the drafting process would also be useful but not likely determinative regarding intent. For instance, the basis on which House Bill 566's district lines were drawn, the number of alternative maps created, and the extent to which those alternatives affected districts' partisanship would all be valuable. Although a plaintiff may allege discriminatory intent against Democratic voters, a court would have difficulty definitively finding that intent was based solely on this additional information.¹⁵⁹

2. Effect

However, if a court does find sufficient evidence of discriminatory intent, the analysis then turns to the plan's discriminatory effect. Georgia House Bill 566 redrew seventeen house districts across various parts of Georgia.¹⁶⁰ A majority of those districts have remained uncontested in-state representative elections since 2012.¹⁶¹ Following the 2015 plan, however, some previously uncontested districts were suddenly contested in the 2016 election cycle,¹⁶² and other districts experienced sharp increases or decreases in their voting population.¹⁶³ These observations are illustrated in Table 2

159. See *id.* at 1283–84.

160. H.B. 566, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015). The Bill redrew the boundaries of state house districts 27, 30, 53, 55, 59, 60, 73, 104, 105, 109, 110, 111, 130, 165, 166, 176, and 177. *Id.*

161. Compare *General Election 2016*, *supra* note 112 (districts 27, 33, 59, 104, 110, 121, 130, 165, 166, and 176 were uncontested); with *General Election: November 4, 2014*, GA. SEC'Y OF STATE (last updated Nov. 10, 2014, 6:56 PM), <http://results.enr.clarityelections.com/GA/54042/149045/en/summary.html> [https://perma.cc/XQ7X-B9WM] [hereinafter *General Election 2014*] (districts 27, 33, 59, 60, 104, 109, 121, 130, 165, 166, 176, and 177 were uncontested), and *General Election: November 6, 2012*, GA. SEC'Y OF STATE (last updated Nov. 21, 2012, 8:55 AM), <http://results.enr.clarityelections.com/GA/42277/113204/en/summary.html> [https://perma.cc/L2VV-M64Y] [hereinafter *General Election 2012*] (districts 27, 30, 33, 59, 60, 73, 104, 109, 110, 121, 130, 165, and 166 were uncontested).

162. Compare *General Election 2014*, *supra* note 161 (districts 60, 109, and 177 went uncontested); with *General Election 2016*, *supra* note 112 (districts 60, 109, and 177 became contested).

163. Compare *General Election 2014*, *supra* note 161 (showing that, approximately, district 30 had 11,000 voters, district 60 had 8,500 voters, and district 109 had 14,000 voters, and that all of those districts were uncontested); with *General Election 2016*, *supra* note 112 (showing that district 30 had 5,302 more Democratic voters—more than half of the 9,200 voters added—district 60 had 7,000 more Democratic voters and 1,000 more Republican voters, district 109 had 11,389 more Democratic voters

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below, which represents the voter distribution of districts affected by the plan from 2012—when the decennial district plan was adopted—to the first election under House Bill 566 in 2016.¹⁶⁴ (The Republican Party is abbreviated by an “R” and the Democratic Party by a “D.”)¹⁶⁵

but only 1,000 more Republican voters, and there were 10,000 more voters in district 111).

164. *See infra* Table 2.

165. *See infra* Table 2.

Table 2. Voter Distribution in Georgia House Elections 2012–2016

<u>District</u>	<u>R Votes</u> <u>2016</u>	<u>D Votes</u> <u>2016</u>	<u>R Votes</u> <u>2014</u>	<u>D Votes</u> <u>2014</u>	<u>R Votes</u> <u>2012</u>	<u>D Votes</u> <u>2012</u>
27	19,469	0	12,685	0	17,290	0
30	15,115	5,302	11,127	0	15,337	0
33	19,190	0	12,098	0	15,584	6,161
59	0	20,276	0	14,361	0	20,126
60	1,443	15,824	0	8,520	0	13,374
73	15,661	8,610	10,138	5,290	18,963	0
104	19,776	0	13,133	0	18,267	0
105	12,411	12,189	7,497	6,708	10,561	10,007
109	15,507	11,389	14,096	0	19,822	0
110	18,003	0	9,063	5,442	16,365	0
111	14,488	13,542	9,540	8,416	13,172	11,695
121	20,582	0	12,014	0	17,517	0
130	16,655	0	11,060	0	13,620	0
165	0	18,197	0	11,156	0	17,607
166	26,255	0	17,260	0	24,041	0
176	14,891	0	7,938	0	13,634	0
177	5,104	9,226	0	6,582	5,338	10,998
Total	234,550	114,555	147,649	66,475	219,511	89,968

Districts 105, 109, and 111 are of particular note because of their competitiveness and, in the case of District 109, the large influx of Democratic voters under the 2015 plan.¹⁶⁶ In 2012, the Republican candidate in District 105 won by 554 votes, but that same candidate won by only 222 votes in 2016 due to an influx of Democratic

166. See *supra* Table 2 (showing 11,389 more votes for the 2016 Democratic candidate—comprising 47.35% of the total vote—than in the prior election). Districts 105, 109, and 111 are grey-shaded for easy reference because they are important for this analysis and are frequently referenced. See *supra* Table 2.

voters under House Bill 566.¹⁶⁷ Similar findings are evident in District 109 where the uncontested Republican candidate won by nearly 20,000 votes in 2012 but won by little more than 4,000 in 2016.¹⁶⁸ Likewise, Republicans in District 111 won by 500 fewer votes in 2016 than in 2012.¹⁶⁹ These voting shifts give the impression that because of the 2015 plan, Democratic voters were cracked into districts like District 109 and packed into others.¹⁷⁰

The first step in the EG analysis is identifying the number of votes each party wasted.¹⁷¹ Due to the many uncontested races, those districts' vote shares must be apportioned.¹⁷² Unfortunately, it was not possible to accurately calculate their vote shares for 2012 and 2016 because of a lack of other election data based on house districts.¹⁷³ However, in uncontested districts that were previously contested, vote shares in prior contested races were proportionally applied to the 2014 and 2016 elections.¹⁷⁴ To account for districts that have always been uncontested, a voter share of twenty-five percent was applied to the opposing party and seventy-five percent to the uncontested one.¹⁷⁵ From there, each party's wasted and net

167. See *supra* Table 2. In the 2012 election, there were 554 more Republican votes than Democratic votes. See *supra* Table 2. In the 2016 election, Republican votes outnumbered Democratic votes by only 222. See *supra* Table 2.

168. See *supra* Table 2. In the 2012 election, Republicans won by 19,822 votes, whereas they only won by 4,118 votes in 2016's election. See *supra* Table 2.

169. See *supra* Table 2. In the 2012 election, the Republican candidate received 1,477 more votes than the Democratic candidate. See *supra* Table 2. But in the 2016 election, Republican votes outnumbered Democratic votes by only 531. See *supra* Table 2.

170. See *supra* Table 2. An inference that Democratic voters were packed into District 109 is easily made from there being no Democratic voters in the 2012 or 2014 elections, but after the 2015 plan, there were over 11,000 Democratic voters in 2016. See *supra* Table 2. Adding to this assumption is the fact that the district's total number of votes cast in the 2016 election also increased. See *supra* Table 2. So, it is not just a matter of some 2014 voters voting Democrat instead of Republican. See *supra* Table 2.

171. Stephanopoulos & McGhee, *supra* note 14, at 851–53.

172. *Id.* at 866–67.

173. See *General Election 2016*, *supra* note 112 (containing only information on the 2016 presidential election per congressional district voter shares).

174. See *infra* Table 3; see also *General Election 2016*, *supra* note 112. District 110, for example, went uncontested during the 2016 election. See *infra* Table 3. It was, however, contested in the 2014 election with the Republican candidate garnering 62.48% of the vote and the remaining 37.52% going to the Democrats. See *supra* Table 2. Accordingly, 62.48% of the total 18,003 votes in 2016 were apportioned to the Republican candidate, and 37.52% were distributed to the Democratic one. See *infra* Table 3. This yielded Republicans 11,249 votes and Democrats 6,754 votes in the 2016 election calculation, proportional to the contested District 110 election in 2014. See *infra* Table 3.

175. Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS.

wasted votes were calculated.¹⁷⁶ Dividing the total net wasted votes by the total votes cast results in an EG of 6.345% in the 2012 election, 9.559% in 2014, and, in 2016, 13.515% under House Bill 566.¹⁷⁷

STUD. Q. 55, 66 n.5 (2014) (using a “default setting for uncontested races, which assigns uncontested Republicans a vote share of 0.25 and uncontested Democrats a vote share of 0.75”); *see also infra* Table 3. Because it has never been contested, District 27 illustrates this default allotment. *See infra* Table 3. When the 19,469 total Republican votes in District 27’s 2016 election are multiplied by seventy-five percent, 14,602 votes are dispensed to the Republican candidate, and the remaining 4,867, or twenty-five percent, are given to the Democrats. *See infra* Table 3. This method’s inaccuracy becomes obvious when the net wasted votes are calculated because it always produces one net wasted vote for the losing party. *See infra* Table 3.

176. *See infra* Table 3; *infra* Table 4; *infra* Table 5. Again, wasted votes are those votes for a winning candidate beyond that which is needed to secure a win and all votes for a losing candidate. Stephanopoulos & McGhee, *supra* note 14, at 851. For instance, the number of votes a nominee needs to win District 105 is 12,301—half of the 24,600 total votes in that district plus one. *See infra* Table 3. Thus, because the Republican candidate won with 12,411 votes, she wasted 110 votes. *See infra* Table 3. Conversely, the losing nominee for the Democratic Party wasted all 12,189 of her votes. *See infra* Table 3. The net wasted votes in that district is then derived from the difference between each party’s wasted votes, which 12,079 Democratic votes in District 105. *See infra* Table 3.

177. *See supra* Table 3 ($47,180 \div (234,550 + 114,555) = .13515$); *supra* Table 4 ($20,469 \div (147,649 + 66,475) = .09559$); *supra* Table 5 ($19,636 \div (219,511 + 89,968) = .06345$).

Table 3. Wasted Votes in the 2016 Election

District	Apportioned R Votes	Apportioned D Votes	R Wasted Votes	D Wasted Votes	Net Wasted Votes
27	14,602	4,867	4,866	4,867	1 D
30	15,115	5,302	4,905	5,302	397 D
33	14,393	4,798	4,797	4,798	1 D
59	5,069	15,207	5,069	5,068	1 R
60	1,443	15,824	1,443	7,189	5,746 D
73	15,661	8,610	3,524	8,610	5,086 D
104	14,832	4,944	4,943	4,944	1 D
105	12,411	12,189	110	12,189	12,079 D
109	15,507	11,389	2,058	11,389	9,331 D
110	11,248	6,755	2,245	6,755	4,510 D
111	14,488	13,542	472	13,542	13,070 D
121	15,437	5,146	5,145	5,146	1 D
130	12,491	4,164	4,163	4,164	1 D
165	4,549	13,648	4,549	4,548	1 R
166	19,691	6,564	6,563	6,564	1 D
176	11,168	3,723	3,722	3,723	1 D
177	5,104	9,226	5,104	2,060	3,044 R
				TOTAL	47,180 D

Table 4. Wasted Votes in the 2014 Election

District	Apportioned R Votes	Apportioned D Votes	R Wasted Votes	D Wasted Votes	Net Wasted Votes
27	9,514	3,171	3,170	3,171	1 D
30	8,345	2,782	2,781	2,782	1 D
33	8,671	3,427	2,621	3,427	806 D
59	3,590	10,771	3,590	7,180	1 R
60	2,130	6,390	2,130	2,129	1 R
73	10,138	5,290	2,423	5,290	2,867 D
104	9,850	3,283	3,282	3,283	1 D
105	7,497	6,708	393	6,708	6,315 D
109	10,572	3,524	3,523	3,524	1 D
110	9,063	5,442	1,809	5,442	3,633 D
111	9,540	8,416	561	8,416	7,855 D
121	9,011	3,004	3,003	3,004	1 D
130	8,295	2,765	2,764	2,765	1 D
165	2,789	8,367	2,789	2,788	1 R
166	12,945	4,315	4,314	4,315	1 D
176	5,954	1,985	1,984	1,985	1 D
177	2,151	4,431	2,151	1,139	1,012 R
				TOTAL	20,469 D

Table 5. Wasted Votes in the 2012 Election

District	Apportioned R Votes	Apportioned D Votes	R Wasted Votes	D Wasted Votes	Net Wasted Votes
27	12,968	4,323	4,323	4,322	1 R
30	11,503	3,834	3,833	3,834	1 D
33	15,584	6,161	4,711	6,161	1,451 D
59	5,032	15,095	5,032	5,031	1 R
60	3,344	10,031	3,344	3,343	1 R
73	14,222	4,741	4,740	4,741	1 D
104	13,700	4,567	4,566	4,567	1 D
105	10,561	10,007	276	10,007	9,731 D
109	14,867	4,956	4,955	4,956	1 D
110	12,274	4,091	4,090	4,091	1 D
111	13,172	11,695	738	11,695	10,958 D
121	13,138	4,379	4,378	4,379	1 D
130	10,215	3,405	3,404	3,405	1 D
165	4,402	13,205	4,402	4,401	1 R
166	18,031	6,010	6,009	6,010	1 D
176	10,226	3,409	3,408	3,409	1 D
177	5,338	10,998	5,338	2,829	2,509 R
				TOTAL	19,636 D

It is ultimately up to the courts and states to set thresholds beyond which an EG is unacceptable.¹⁷⁸ However, the EG in the 2016 election is far too high to fall within any acceptable threshold.¹⁷⁹ This

178. Stephanopoulos & McGhee, *supra* note 14, at 890–91.

179. *See id.* at 854. The EG in Georgia's 2016 election more than doubled the eight percent threshold suggested by Stephanopoulos and McGhee. *Id.*

EG is well above the eight percent threshold suggested by Stephanopoulos and McGhee¹⁸⁰ as well as the seven percent threshold argued for in *Whitford v. Gill*.¹⁸¹ An EG of this magnitude demonstrates the discriminatory effect House Bill 566 has on Democratic voters by redrawing district lines to decrease their vote's impact and the efficiency with which their votes translate into seats.¹⁸² In 2016, for example, Democrats received 44% of the vote in districts affected by House Bill 566, yet they won less than 25% of those seats.¹⁸³

3. *Justification*

After showing discriminatory intent and effect, the burden shifts to the defendant to prove the effect is justified by legitimate legislative ends.¹⁸⁴ Looking at traditional principles, almost all the districts that House Bill 566 manipulated more or less maintain a normal shape.¹⁸⁵ The exception is District 111, curving from Stockbridge down to the east and dipping in and out of different cities and neighborhoods—coincidentally resembling a salamander.¹⁸⁶ However, even with this one questionable district, the plan was enacted largely along party lines, it generally preserved communities of interest, and it mostly respected political subdivisions.¹⁸⁷

Another possible defense of the plan is Georgia's natural political geography. The state has never been one for political moderation.¹⁸⁸

180. *Id.*

181. *Whitford v. Gill*, 218 F. Supp. 3d 837, 861 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

182. *See supra* TABLE 3 (showing that although Democrats made up a little less than half the voting population, they secured less than a quarter of the total available seats).

183. *See supra* TABLE 2.

184. *See, e.g., Whitford*, 218 F. Supp. 3d at 884.

185. LEGIS. & CONG. REAPPORTIONMENT OFF., GA. HOUSE DISTRICT MAP (2015), <http://www.legis.ga.gov/Joint/reapportionment/Documents/2015/House15-PACKET.pdf> [<https://perma.cc/97FV-5CJF>].

186. *See Overview of State House District 111, Georgia*, STATISTICALATLAS.COM, <https://statisticalatlas.com/state-lower-legislative-district/Georgia/State-House-District-111/Overview> [<https://perma.cc/N4V5-C8JC>] (last visited Nov. 6, 2018) [hereinafter *District 111*].

187. *See* GA. HOUSE DISTRICT MAP, *supra* note 185.

188. *See* Stephanopoulos & McGhee, *supra* note 14, at 879–84 (showing that both Georgia's congressional and state house plans largely favored Democrats in the late twentieth century and currently favor Republicans).

Georgia currently boasts strong Republican support from everywhere but a few metropolitan areas, namely around metro Atlanta.¹⁸⁹ An easy contention is that Georgia naturally favors Republicans more than Democrats, no matter how districts are arranged.¹⁹⁰ However, as the plaintiffs argued in *Whitford v. Gill*,¹⁹¹ a plausible counter is that even if Georgia is naturally pro-Republican, there is no evidence strong enough to account for the plan's large EG. The success of this counterargument hinges on other evidence supporting the plan's discriminatory intent and effect: evidence that is currently unavailable.

It is also important to remember that adherence to traditional districting criteria does not necessarily ensure a plan's constitutionality.¹⁹² Further proof, such as evidence that this plan has the least partisan bias of other considered plans or evidence that the plan is necessary to account for large population shifts among the affected districts, is required to justify the Bill's effects.

Based on this analysis, Georgia House Bill 566's redistricting plan meets all required elements of the standard and violates Georgia Democratic voters' rights afforded under the Constitution. It is, therefore, necessary to find a solution to this problem.

III. Proposal

The solution to Georgia's excessively gerrymandered districts is simple enough in theory: the state legislature needs to adopt a new plan that is less skewed toward one party.¹⁹³ This plan does not need

189. See *2016 Georgia Presidential Election Results*, POLITICO, <http://www.politico.com/2016-election/results/map/president/georgia/> [<https://perma.cc/Y94V-SLU2>] (last visited Nov. 6, 2018).

190. See *Ga. State Conference of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1282 (N.D. Ga. 2017); see also *Whitford v. Gill*, 218 F. Supp. 3d 837, 912 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) ("The defendants' primary argument is that Wisconsin's political geography naturally favors Republicans because Democratic voters reside in more geographically concentrated areas, particularly in urban centers like Milwaukee and Madison.").

191. *Whitford*, 218 F. Supp. 3d at 884, 912.

192. *Id.* at 888, 912 (recognizing that "compliance with traditional districting principles [does not] necessarily create[] a constitutional 'safe harbor' for state legislatures").

193. See *id.* at 911–12 (arguing that alternative maps created by legislature will "achieve[] the legislature's valid districting goals while generating a substantially smaller partisan advantage" than Act 43).

to overcompensate by giving the Democratic Party an unequal political advantage, nor does it need to result in complete partisan fairness. In fact, it ought not do either because, as discussed earlier,¹⁹⁴ a one-to-one voting ratio is not constitutionally required and would be hard, if not impossible, to achieve.¹⁹⁵ Instead, the controlling party can still experience some advantage over the other party, but the state legislature should minimize this advantage as much as possible to reduce the ineffectiveness of the minority party's voting power.¹⁹⁶ Though simple in theory, the solution's implementation, without judicial intervention, may prove more challenging.¹⁹⁷

A. *The Trouble with Judicial Remedies*

The current solution to a plan that infringes on citizens' voting rights is to resolve it in court.¹⁹⁸ This is a viable option of last resort, and it has never succeeded and cannot do so without both parties expending substantial time and effort in litigation.¹⁹⁹ Nevertheless, if a discriminated party does make a successful claim against an ultimately unconstitutional Georgia plan, the appropriate remedy is for the court to enter an injunction barring the use of the plan in future elections.²⁰⁰ The burden of creating a remedial districting plan, however, will still rest on Georgia's legislature, and the legislature must have a reasonable opportunity to adopt a constitutional plan.²⁰¹

194. *See supra* Part I.

195. *See Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (finding that statewide votes in proportion to statewide representation is not required by the Constitution).

196. *Whitford*, 218 F. Supp. 3d at 911–12.

197. *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring). Justice Kennedy agreed that “[a] decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process.” *Id.*

198. *See Whitford v. Gill*, No. 15-cv-421-bbc, 2017 U.S. Dist. LEXIS 11380, at *2 (W.D. Wis. Jan. 27, 2017).

199. *E.g.*, *Ga. State Conference of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1283 (N.D. Ga. 2017) (“The Supreme Court’s jurisprudence on partisan gerrymandering teaches us that the Court could rule in a variety of different ways on [gerrymandering] issues . . . including not ruling on them at all.”).

200. *Whitford*, 2017 U.S. Dist. LEXIS 11380, at *2 (“The parties agree that the appropriate remedy in this case is to enter an injunction prohibiting the use of Act 43’s districting plan in future elections.”).

201. *Id.* at *2–3.

The courts are not an effective enough body to devise a state district plan, not only because of constitutional fears of breaching separation of powers principles but also because the state is a better institution for “reconcil[ing] traditional state policies within the constitutionally mandated framework of substantial population equality.”²⁰² No entity other than Georgia’s legislature knows better the unique characteristics and underpinnings of Georgia’s population.²⁰³ Thus, the legislature also knows how best to cater to those qualities while conforming to constitutional voting standards.

Unlike plans enacted by the state legislature on its own accord, instances where courts force a plan on the state risk excessive judicial intervention that disrupts the state’s legislative process.²⁰⁴ Opponents of the EG warn that if the judiciary is left responsible for correcting all unconstitutional districting plans, the standard will open courts to a tremendous volume of gerrymandering claims, clogging up courts with meritless suits and making the judicial system ineffective.²⁰⁵

However, these fears are misplaced. Upholding the Constitution and enforcing violations of it cannot be weighed against the inconvenience of doing so.²⁰⁶ Although the states have power over their own interests, this power does not insulate them when used to “circumvent[] a federally protected right.”²⁰⁷ The emergence of a manageable standard like the one in *Whitford v. Gill* also reduces the complexity of litigating and deciding gerrymandering cases, imposing less burdens on courts than past gerrymandering cases.²⁰⁸

202. *Id.* at *4 (quoting *Gorin v. Karpan*, 755 F. Supp. 1430, 1445–46 (D. Wyo. 1991)) (“This very basic principle is grounded not only on the constitutional limitations of federal authority but also on the practical reality that it is the state legislature, not the federal court, that is ‘the best institution “to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.”’”).

203. *Id.*

204. Brief for Appellants, *supra* note 148, at 2 (“Whenever a politically minded body draws electoral boundaries . . . any displeased voter in the State (even one living in a district not altered by the new map) can file a lawsuit in federal court seeking invalidation of the entire map.”).

205. *Id.* at 2. Under the EG, “one out of every three legislative maps over the last [forty-five] years would have had too much partisan effect.” *Id.* at 3 (emphasis omitted).

206. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

207. *Id.*

208. G. Michael Parsons, *The Institutional Case for Partisan Gerrymandering Claims*, 2017 CARDOZO L. REV. DE NOVO 155, 157 (2017).

Furthermore, though state legislators may instinctively want to nudge district lines one way or the other to better serve their own party, not every instance of this will result in court action.

In addition to certain levels of partisanship being common and almost unavoidable in districting maps, potential plaintiffs will find it hard to establish the legislators' discriminatory intent if the map only makes minor changes to district lines.²⁰⁹ Similarly, proving such a plan's discriminatory effect will be equally challenging because it is likely too minute to account for any substantial diminishment in voting power.²¹⁰ It is important to reiterate that it should not be the courts' primary responsibility to determine when a plan is unconstitutional. While established redistricting standards make judicial intervention easier, it is the state's responsibility to implement a plan that does not require judicial oversight.

B. A Legislative Solution

With the clear limits imposed on partisan gerrymandering by the intent-and-effect standard, the first line of defense in protecting constitutional voting rights rests with individual state legislatures.²¹¹ The power to enact redistricting plans undisputedly belongs to the states, and, in light of the current legal tests for determining unconstitutionally gerrymandered districts, it is the states' prerogative to pass plans that will result in the least amount of political and judicial resistance.²¹² Therefore, enacting district maps that are constitutional to begin with will avoid future costs of litigation and public backlash resulting from constitutional issues.²¹³

In Georgia's situation, a legislative solution would call for the immediate passage of a new district map that will correct the lines drawn by House Bill 566. Though difficult, it is possible for a new

209. *Vieth v. Jubelirer*, 541 U.S. 267, 332 (2004) (Stevens, J., dissenting) ("[P]olitical considerations may properly influence the decisions of our elected officials."); *Parsons*, *supra* note 208, at 176.

210. *Parsons*, *supra* note 208, at 176.

211. *Whitford v. Gill*, 218 F. Supp. 3d 837, 884, 928 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

212. U.S. CONST. art. I, § 2, cl. 3; *see Whitford*, 218 F. Supp. 3d at 883–84.

213. *See Weiss*, *supra* note 10, at 696.

plan to have a statewide view and ensure all 180 of Georgia's house districts conform to the standards set out above, as well as the Supreme Court's decision in *Gill v. Whitford*.²¹⁴ In fact, Georgia and every other state will have to enact such a map with the 2020 census approaching.²¹⁵ In the interim, however, the more pertinent issues a new plan must address are the seventeen districts affected by House Bill 566 and Districts 105 and 111 in particular.²¹⁶

The first step in rectifying Georgia's district lines is to have a more inclusive drafting process. Conducting secret drafting meetings and omitting entire political parties from those meetings will likely result in maps drawn that heavily disfavor the excluded party and will also add to the appearance of discriminatory intent if the map is challenged.²¹⁷ If Democratic representatives—the party excluded from drafting meetings for House Bill 566²¹⁸—are included in the drafting process, the resulting map may not give each party equal representational power, but it will yield districts that lean more toward political fairness compared to one created wholly by Republicans.²¹⁹ Similarly, more political fairness will likely result if all Georgia residents are also allowed to publicly comment on the proposed plan prior to its enactment and if those comments are seriously considered rather than ignored.²²⁰ If political fairness concerns are addressed and resolved before a plan leaves the drafting room, public outrage, like what followed the proposed redistricting plan in 2017, would be eliminated.²²¹

214. Brief of Amici Curiae Judicial Watch, *supra* note 122, at *17–18.

215. Parsons, *supra* note 208, at 176.

216. H.B. 566, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

217. Ga. State Conference of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1271 (N.D. Ga. filed Aug. 25, 2017); *Whitford*, 218 F. Supp. 3d 894.

218. *NAACP*, 269 F. Supp. 3d at 1271.

219. Cf. Stephanopoulos & McGhee, *supra* note 14, at 865. While discussing the problem faced in apportioning voter share in uncontested races, Stephanopoulos and McGhee point at the only certainties in that scenario is that those races' "outcome[s] would have been different had [they] been contested." *Id.*

220. Cf. *NAACP*, 269 F. Supp. 3d at 1271. "[M]inority residents of Georgia were denied any opportunity for public comment on the measure" that is the subject of the suit. *Id.*

221. See, e.g., Aaron Gould Sheinin, *Democrats Cry Foul as House Republicans Redraw District Lines*, ATLANTA J.-CONST. (Mar. 3, 2017, 6:49 PM), <http://www.myajc.com/news/state—regional-govt—politics/democrats-cry-foul-house-republicans-redraw-district-lines/sOOXVi3vMCWJCB7gpAntTN/> [https://perma.cc/3JGX-C5WR]; Torpy, *supra* note 18.

Legislative mapmakers also need to work alongside statistical experts during the drafting process. Together, they will create many different district maps that compose a spectrum of partisanship ranging from ones heavily in favor of Republicans to those that greatly advantage Democrats.²²² As part of developing this partisanship range, legislators must vary each map's EG, shape, compactness, divisions of political neighborhoods, and other "traditional" factors.²²³

On the other hand, Georgia should not set the EG's constitutionality threshold at the eight percent limit suggested by Stephanopoulos and McGhee.²²⁴ Rather, Georgia legislators must use their discretion in adopting a precise threshold mainly due to the state's history of single-party dominance and profound political geography that favors one party over the other.²²⁵ For example, in the 1970s and 1980s, the EGs of Georgia's state house plans were the most pro-Democratic not just of any state in the south, which was predominately inclined toward Democrats, but of any state in the nation.²²⁶ During this period, Georgia's EGs consistently exceeded the eight percent threshold, landing instead in the fourteen to sixteen percent range.²²⁷ Since 1980, each successive Georgia plan has reflected a stronger Republican preference, eventually shifting to a Republican EG greater than six percent in 2012.²²⁸ Averaging some of the highest EGs on both ends of the spectrum, Georgia's threshold ought to be raised to ten percent to account for the state's trend in extreme political favoritism. This specific threshold number is, of course, merely a suggestion. Georgia's legislature is free to follow

222. See Stephanopoulos & McGhee, *supra* note 14, at 889–90.

223. *Vieth v. Jubelirer*, 541 U.S. 267, 347–50 (2004) (Souter, J., dissenting).

224. Stephanopoulos & McGhee, *supra* note 14, at 888.

225. See *id.* at 879–84.

226. See *id.* at 882–84. Georgia's state house plans in the 1970s were some of the most pro-Democratic EGs, second only to South Carolina, and, throughout the 1980s, they exhibited the most pro-Democratic EGs of any state. *Id.*

227. See *id.* at 883–84, 889.

228. *Id.* at 882–83 (showing that each successive decennial districting plan since the 1980s has trended towards higher Republican EGs). See *supra* TABLE 5 (showing the EG under the 2012 plan to be 6.345%).

any limit it wishes, so long as it is reasonable and does not conflict with any threshold imposed by the Supreme Court.²²⁹

Mapmakers must also avoid creating districts that are facially susceptible to unconstitutional gerrymandering claims. Unlike the revised District 111 under House Bill 566—the district most facially gerrymandered—districts devised under this revamped drafting process should maintain boundaries that are not highly unusual in shape and should not cut across political neighborhoods and towns.²³⁰ A good example of this are the districts created in and around Atlanta. In counties like Fulton, DeKalb, Henry, and Clayton, residents predominately vote for Democrats.²³¹ Accordingly, house lines must largely stick to pre-established borders and avoid mixing Democratic metro areas with more Republican suburbs²³² to decrease the likelihood of packing and cracking. Although this method is similar to the one used in drafting Wisconsin’s Act 43, the difference is that both parties will participate in drafting so that, unlike Act 43, the map ultimately enacted will be more politically competitive and give a significantly smaller partisan advantage to one party.²³³

Conforming to drafting guidelines like these promotes political transparency and fairness that does not necessitate one political party completely ceding to the other, but instead gives Georgia legislators “a comprehensible field map to stay *out* of court.”²³⁴ A renewed drafting process will also eliminate legislators’ focus on creating districts that secure their re-elections, thus allowing their concerns to shift to issues of preserving communities that actually share political interests, as well as achieving districts that best maximize

229. See Stephanopoulos & McGhee, *supra* note 14, at 890–91.

230. See also *Whitford v. Gill*, 218 F. Supp. 3d 837, 888, 912 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). For a better visual of the unusual and salamander-like shape of District 111, see *District 111*, *supra* note 186.

231. *2016 Georgia Presidential Election Results*, *supra* note 189.

232. See *General Election 2016*, *supra* note 112; *General Election 2014*, *supra* note 161; *General Election 2012*, *supra* note 161. Election data show that democratic candidates in districts surrounding metro-Atlanta historically run unopposed and that republican candidates in suburbs like Alpharetta are similarly uncontested. *General Election 2016*, *supra* note 112; *General Election 2014*, *supra* note 161; *General Election 2012*, *supra* note 161.

233. *Whitford*, 218 F. Supp. 3d at 911–12.

234. Parsons, *supra* note 208, at 177.

communities' political influence.²³⁵ The Georgia legislature should adopt internal procedures like the ones suggested here that ensure substantial partisan advantage is not a factor in district mapmaking.

CONCLUSION

Excessive partisan gerrymandering is increasingly more prominent in state redistricting plans. Legislators have abused their majority control of state governments to the point where citizens' constitutional voting rights are infringed and severely handicapped by plans that discriminate against voters because of political affiliations.²³⁶ Though a certain level of partisan gerrymandering is tolerable and unavoidable, the extent to which it is involved in current political processes ignores basic constitutional rights.²³⁷ After decades of the Supreme Court rejecting unconstitutional gerrymandering claims, a justiciable standard has emerged with the Efficiency Gap.²³⁸ This half-political, half-statistical measure works in conjunction with a three-step standard: evidence of a plan's discriminatory intent, effect, and lack of justification.²³⁹ The result is a legal test that determines when a plan is unconstitutional and also addresses the Supreme Court's concerns with past tests.²⁴⁰

Applying this test, Georgia's 2015 redistricting plan is likely unconstitutional. This results from the Republican-controlled legislature's intent to weaken Democratic voting powers and an Efficiency Gap so high it nearly doubles the threshold proposed by the measure's creators. Additionally, unusual districts that splice political communities and a lack of legitimate legislative justification in designing these districts also contribute to the plan's unconstitutionality. However, Georgia can take steps to prevent this

235. *Id.*

236. *See* Ga. State Conference of the NAACP v. Georgia, 269 F. Supp. 3d 1266, 1271 (N.D. Ga. filed Aug. 25, 2017); *Whitford*, 218 F. Supp. 3d at 898–99.

237. *Parsons*, *supra* note 208, at 176.

238. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267, 287–88, 293 (2004); *Davis v. Bandemer*, 478 U.S. 109, 116 (1986).

239. *Whitford*, 218 F. Supp. 3d at 884.

240. *Stephanopoulos & McGhee*, *supra* note 14, at 848–49.

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unconstitutionality by enacting a remedial plan that conforms to this new legal standard and by being more inclusive and transparent in future redistricting decisions.